

## **The 2003 Agreement on mutual legal assistance between the European Union and the United States of America as a source of inspiration for mutual assistance between data protection authorities**

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### **1. Scope of investigative measures provided for**

It concerns an 'umbrella agreement', supplementing possible bilateral MLA treaties between the US and individual EU MS (in which the core provisions on investigative measures are typically included), so that only forms of cooperation (listed below) have been regulated which do not commonly feature already in such bilateral treaties:

- Identification of bank information (Article 4)
- cooperation in joint investigation teams (Article 5)
- videoconferencing for taking testimonies of witnesses and experts abroad, or even investigative statements (Article 6)

### **2. Scope/character of proceedings: criminal matters, with cross-over to MLA with administrative authorities**

- default scope: mutual legal assistance in criminal matters
- however: cross-over to MLA between authorities competent in criminal matters and administrative authorities (to the extent that the latter are investigating conduct with a view to a criminal prosecution of the conduct, or referral of the conduct to criminal investigation or prosecution authorities, pursuant to their specific administrative or regulatory authority to undertake such investigation) (Article 8)

### **3. Sharing of personal data**

The Agreement contains very elaborate provisions on data protection, purpose limitation and use conditions (Article 9) and a straightforward and clear article on confidentiality requested by the requesting state (Article 10)

The key dimensions of Article 9 (Limitations on use to protect personal and other data) are the following:

- detailed listing of the accepted purposes of use by the requesting state of any evidence or information obtained from the requested state
- possibility to impose additional use conditions (with control possibility)
- exclusion to have recourse to such additional use conditions as generic restrictions with respect to the legal standards of the requesting State for processing personal data: in other words, the 'adequacy' requirement vis-à-vis 3<sup>rd</sup> states (like, from an EU perspective, the US) was hereby circumvented

Article 10 (Requesting State's request for confidentiality):

*"The requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting State. If the request cannot be executed without breaching the requested confidentiality, the central authority of the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed".*

**4. Applicable law**

Entry into force governed by domestic law, phrased in a very open fashion (without explicitly requiring ratification):

"exchange [of] instruments indicating that they have completed their internal procedures [for the purpose of entry into force]" (Article 18)

In addition, there are several instances, relating to the taking of specific investigative measures or possible limitations of cooperation, where reference is made to applicable law:

- **Identification of bank information** (Article 4)
  - [...]
  - 4. (a) Subject to subparagraph (b), a State may, pursuant to Article 15, limit its obligation to provide assistance under this Article to:
    - (i) offences punishable under the laws of both the requested and requesting States;
    - (ii) offences punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State; or
    - (iii) designated serious offences punishable under the laws of both the requested and requesting States.
  - (b) A State which limits its obligation pursuant to subparagraph (a)(ii) or (iii) shall, at a minimum, enable identification of accounts associated with terrorist activity and the laundering of proceeds generated from a comprehensive range of serious criminal activities, punishable under the laws of both the requesting and requested States.
  - [...]
  - 6. The requested State shall respond to a request for production of the records concerning the accounts or transactions identified pursuant to this Article, in accordance with the provisions of the applicable mutual legal assistance treaty in force between the States concerned, or in the absence thereof, in accordance with the requirements of its domestic law.
  - [...]
- **Joint investigation teams** (Article 5)
  - [...]
  - 4. Where the joint investigative team needs investigative measures to be taken in one of the States setting up the team, a member of the team of that State may request its own competent authorities to take those measures without the other States having to submit a request for mutual legal assistance. The required legal standard for obtaining the measure in that State shall be the standard applicable to its domestic investigative activities.
- **Video conferencing** (Article 6)
  - 1. The Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States of America

for taking testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested State, to the extent such assistance is not currently available. To the extent not specifically set forth in this Article, the modalities governing such procedure shall be as provided under the applicable mutual legal assistance treaty in force between the States concerned, or the law of the requested State, as applicable.

- 2. Unless otherwise agreed by the requesting and requested States, the requesting State shall bear the costs associated with establishing and servicing the video transmission. Other costs arising in the course of providing assistance (including costs associated with travel of participants in the requested State) shall be borne in accordance with the applicable provisions of the mutual legal assistance treaty in force between the States concerned, or where there is no such treaty, as agreed upon by the requesting and requested States.
- [...]
- 4. Without prejudice to any jurisdiction under the law of the requesting State, making an intentionally false statement or other misconduct of the witness or expert during the course of the video conference shall be punishable in the requested State in the same manner as if it had been committed in the course of its domestic proceedings.
- [...]
- 6. This Article is without prejudice to application of provisions of bilateral mutual legal assistance agreements between Member States and the United States of America that require or permit the use of video conferencing technology for purposes other than those described in paragraph 1, including for purposes of identification of persons or objects, or taking of investigative statements. Where not already provided for under applicable treaty or law, a State may permit the use of video conferencing technology in such instances. [...]
- **Limitations on use to protect personal and other data** (Article 9)
  - [...]
  - 4. A requested State may apply the use limitation provision of the applicable bilateral mutual legal assistance treaty in lieu of this Article, where doing so will result in less restriction on the use of information and evidence than provided for in this Article.
  - 5. Where a bilateral mutual legal assistance treaty in force between a Member State and the United States of America on the date of signature of this Agreement, permits limitation of the obligation to provide assistance with respect to certain tax offences, the Member State concerned may indicate, in its exchange of written instruments with the United States of America described in Article 3(2), that, with respect to such offences, it will continue to apply the use limitation provision of that treaty.
- **Non-derogation** (Article 13)
  - Subject to Article 4(5) and Article 9(2)(b), this Agreement is without prejudice to the invocation by the requested State of grounds for refusal of assistance available pursuant to a bilateral mutual legal assistance treaty, or, in the absence of a treaty, its applicable legal principles, including where execution of the request would prejudice its sovereignty, security, ordre public or other essential interests.

## 5. Method of implementation

Characterised by built-in flexibility (examples below):

- direct resolution between competent authorities of of legal, technical or logistical issues that may arise in the execution of videoconference hearings (Article 6.3),

- allowance of expedited, informal communications (Article 7)
- consultations in view of dispute resolution (Article 11)
- designation and notification of competent authorities by exchange of written instruments (Article 15)
- common review, addressing in particular practical implementation issues (Article 17), etc.